STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-704

December 19, 2003

PUBLIC UTILITIES COMMISSION
Investigation of Skowhegan OnLine Inc., Proposal for UNE loops

EXAMINER'S REPORT

NOTE: This Examiner's Report is written in the form of an Order; however, it is the Advisors recommendation only and does not constitute formal Commission action. Parties may file exceptions to this Report by close of business on January 21, 2003. We anticipate that the Commission will consider this case at its deliberative session on January 26, 2004.

I. SUMMARY

We order Verizon to provision unbundled network element (UNE) copper subloops that terminate on a pole or remote terminal box designated by the competitive local exchange carrier (CLEC), where facilities exist. In order for Verizon to provision the UNE, spare copper subloops must exist and be terminated at an accessible terminal and CLECs must provide Verizon with a street address or pole number when placing an order. Verizon must make all necessary changes to its Operational Support Systems (OSS) required to provide this UNE to CLECs within 90 days of this Order.

II. BACKGROUND

On June 12, 2002, in Docket No. 2002-353, the Commission's Rapid Response Process Team (RRPT) issued a decision on a complaint filed by Skowhegan OnLine, Inc. (SOI) in which SOI claimed that Verizon was improperly rejecting its unbundled network element (UNE) loop orders. The RRPT complaint arose after SOI began exploring the possibility of ordering UNE loops from Verizon that would extend between

SOI's collocation arrangement in the Skowhegan central office to a termination point at a pole-mounted network interface device (NID) or a SOI-owned remote terminal (RT) box. Termination of UNE loops at pole-mounted NIDs or remote terminal boxes would allow SOI to place its electronic equipment (known as a DSLAM) in the field closer to the end user customers, thus increasing the number of customers who would be able to subscribe to high-speed Internet access through use of DSL. From SOI's RT equipment, SOI would overbuild sections of distribution facilities or obtain copper distribution subloops as UNEs from Verizon to reach customers who want to subscribe to DSL service.

When Verizon rejected SOI's requests, it stated that it could not accommodate SOI's request because unbundled loops must terminate at a customer's premise, and that SOI's pole or pad for placement of a NID does not qualify as a customer premise. Verizon also raised several operational and administrative issues that it claimed prevented it from meeting SOI's request. SOI then filed a complaint through the RRP.

The RRPT determined that under the then-current interconnection agreement and unbundling rules, the product that SOI was attempting to order was a piece of Verizon's network that has not yet been defined as a UNE, and therefore Verizon was not required to provision it. The RRPT made no finding regarding the technical feasibility and/or legality of a Commission decision to require Verizon to provide the facility requested by SOI but did state that SOI's idea held the possibility of advancing the public policy goal of extending broadband capabilities to more of Maine's citizens by eliminating distance barriers that currently exist. Specifically, on page 3 of its decision, the RRPT states that:

> [I]t appears that public policy goals, namely continued and wider deployment of broadband, warrant additional investigation into this matter. SOI's proposal holds the possibility of extending broadband capabilities to more citizens by overcoming the distance limitations that currently exist for DSL service. This is critically important, especially if SOI's allegations that Verizon's loop plant has been mis-designed and limits the availability of DSL to rural customers are true.

On November 26, 2002, the Commission issued a Notice of Investigation (NOI) into SOI's proposed use of UNE loops to extend broadband to rural areas of Maine. Intervenor status was requested by and granted to Biddeford Internet Company (BIC), Cornerstone Communications (Cornerstone), Mid-Maine Communications (Mid-Maine), and the Office of the Public Advocate (OPA),

Testimony was filed by SOI, Verizon, BIC, and Cornerstone. A technical conference was held on March 11, 2003, and a hearing was held on June 18, 2003. At the end of the hearing, it appeared that issues relating to technical feasibility, as well as the legal obligation of Verizon to make the SOI-proposed UNE available, had been resolved, and that the only remaining issues involved implementation and administration. On July 21, 2003, opening briefs were filed by SOI, Verizon, and Cornerstone and on July 28, 2003, the same parties filed reply briefs.

In its briefs, Verizon agreed that it had the capability to provide the connection between SOI's collocation arrangement and the pole-mounted NID or terminal box, terminated in the manner that SOI requested, but that a *bona fide* request (BFR) should be filed by SOI, and a field trial should be commenced to evaluate the practices and procedures that would require modification in order to provision the arrangement properly. Verizon asserted that a field trial would assist in determining the types of

equipment that would be necessary to furnish the connections at the terminals in the field as well as assist in identifying the costs of providing this UNE. Verizon also asserted that SOI agreed that the requested UNE should be classified as a subloop, because a loop must terminate at an end user customer's premises, and Verizon's systems, procedures and practices for ordering, provisioning, maintaining, repairing and billing UNE loops rely on the facility being terminated at a customer's premises.

In its briefs, Cornerstone asserted that Verizon mischaracterized the requested facility as a subloop, which, if so defined, would mean costly and time-consuming delays in completing the BFR process and conducting the necessary field trials. Instead, Cornerstone asserted that SOI had actually requested a loop UNE, which Verizon already provisions on a regular basis to requesting CLECs. Cornerstone also argued that Verizon has a legal obligation to provide the requested UNE and to terminate it in the fashion requested by SOI.

SOI's briefs asserted that Verizon has a responsibility under the Telecommunications Act of 1996 (TelAct) and the Federal Communication Commission's (FCC) *UNE Remand Order*[1] to make the requested subloop facility available to CLECs, and that the provision of this UNE furthers the public good and is compatible with the goal of providing affordable broadband services to more Mainers. SOI asserts that the provision of the requested UNE subloop is technically feasible, and that any technical or compatibility issues could be easily resolved by the companies. While SOI concurred that the requested facility is a subloop and had no objection to

[1] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket 96-98, Third Report and Order And Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, rel. November 5, 1999 ("UNE Remand Order").

participating in a field trial, it objected to bearing all of the costs associated with the BFR procedure, because the result of the process would be a product mandated by the FCC and demanded by many CLECs.

On August 21, 2003, the FCC issued its *Triennial Review Order (TRO)*[2] relating to the implementation of the TelAct. Because of the large number of policy changes made in the TRO, the Hearing Examiner asked the parties to file briefs addressing the impact of the TRO on this proceeding. On October 1, 2003, Verizon filed its Post-TRO Brief arguing that it was no longer obligated to provide access to feeder subloops and that the Commission could not and should not modify the FCC's rules by either adopting a new feeder subloop UNE or allowing SOI to terminate loops at locations other than the end-user customer's premises. On October 15, 2003, SOI filed its Post-TRO Brief asserting that the TRO had not eliminated Verizon's obligation to provide access to all-copper loops (so called "home run loops") nor did it limit the points of termination for those loops. Therefore, SOI contends that Verizon continues to be obligated to provide it with the requested facility.

In its October 31, 2003 Post-TRO Brief, Cornerstone continues its assertion that Verizon mischaracterized the requested arrangement as a subloop, rather than a loop. Cornerstone points out that SOI's initial request was for a *loop* UNE, that the Commission's Notice of Investigation described the request as being for a *loop* UNE, that Mr. Burke's direct testimony described the request as for a UNE *loop*, and the FCC

[2] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338 (rel. August 21, 2003) (*Triennial Review Order or TRO)*.

Rules make clear that the loop SOI is requesting falls within the post-TRO definition of a local loop:

> The local loop network element is defined as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises.

47 C. F.R. § 51.319(a)(1).

Cornerstone also notes that the requested UNE is a "copper loop" within the FCC's definitions, because SOI wants a continuous cooper transmission facility from the main distribution frame (which is cross-connected to SOI's collocation arrangement) in Verizon's central office to the demarcation point with SOI. Cornerstone asserts that SOI is indifferent as to how Verizon physically provides the requested facility, and that it makes no difference whether the loop passes through a Verizon FDI. SOI simply wants the requested UNE to extend as a continuous copper loop from the central office to the location that SOI specifies (the pole-mounted NID or RT enclosure). Cornerstone argues that such an all-copper loop stands alone as an independent, self-sufficient loop facility, without any dependence on, or involvement with, any network electronics, such as digital loop carrier.

Cornerstone further argues that Verizon must provide the requested facility because: (1) it already provides the type of requested loop arrangement for its own retail customers; (2) it is technically feasible to provide the facility; (3) it is legally permissible for SOI to request this type of loop; and (4) it is in the public interest of Maine's citizens to provide the requested loops. Because Verizon already provisions

loops of this type for its own customers,[3] Cornerstone argues that Verizon should be estopped from arguing that the loop need not be provided to competitors. Also, Cornerstone claims that the network arrangements needed to accommodate SOI's request involve only the mildest of routine network modifications, which the FCC has required ILECs to perform as part of their TelAct and TRO obligations. Finally, Cornerstone argues that Section 271 of the TelAct imposes a continuing requirement that Verizon provide the unbundled loops requested by SOI, independent of any actions affecting Section 251 obligations. The TRO provides no relief for Verizon, under either Sections 251 or 271, from its obligation to provide the requested loop UNE for SOI and other CLECs.

III. LEGAL STANDARDS AND POLICY CONSIDERATIONS

A. TRO and Revised FCC Rules

Early in this Investigation there appeared to be a significant amount of confusion created by the use of different terminology to describe this potential UNE. One source of the confusion is the question of whether SOI's requested UNE is a loop or a subloop. Verizon has maintained from the outset that in order for it to be considered a loop, it must terminate on a "customer's premise" and that a pole or cabinet would not be considered a customer premise. At the hearing, Verizon witnesses Rousey stated that if the end of a loop is not a customer premise then Verizon classifies it as a subloop. Verizon also has consistently argued that a CLEC cannot be considered a "customer."

[3] *See* Hinkley Supp. Test., Illustrations 5-8.

Section 51.319(a) of the FCC Rules defines a loop as "a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises." 47 C.F.R. 51.319(a). The FCC does not further define the term "end-user" or "customer" in the context of unbundling requirements but does define an "end-user" for purposes of interstate access charges as "a customer of an interstate service that is not a carrier" unless the carrier is a reseller whose transmissions all originate from the premises of the reseller. 47 C.F.R. § 69.2(m). Verizon's interconnection agreements, including its agreement with SOI, specifically define a customer as a third-party residence or business end user of telecommunications service. *See* Interconnection Agreement, Glossary, § 2.25. We find Verizon's interpretation of the term "customer" to be reasonable – if the FCC or Congress had intended that the terms "customer" and "CLEC" or "LEC" to mean the same thing, it would have used the terms interchangeably or used only one term throughout the TelAct and FCC Rules. Instead, both the TelAct and FCC Rules use the terms in specific contexts.

Having accepted Verizon's interpretation of the term "customer," we find that the UNE proposed by SOI does not meet the FCC's definition of a loop because it does not terminate at a customer's premises – it terminates at a SOI NID which will be used to serve multiple customers at different premises. While there may be an argument that the UNE proposed by SOI should be treated similarly to loops associated with multi-unit dwellings, we will not address that issue today but will instead turn to the FCC's discussion of subloops and CLEC use of the ILEC legacy copper wires.

The FCC defines a subloop as:

> a portion of a copper loop, or hybrid loop, comprised entirely of copper wire or copper cable that acts as a transmission facility between any point of technically feasible access in an incumbent LEC's outside plant, including inside wire owned or controlled by the incumbent LEC, and the end-user customer premises.

47 C.F.R. § 319(b)(1). Again, the FCC requires that the UNE terminate at the end-user customer premises and thus, seemingly, precludes the UNE requested by SOI because the termination is not at an end-user's premises.

This newest definition of a subloop is different from the previous definition in the old version of 47 C.F.R. § 319 established in the *UNE Remand Order* which provided that:

> The subloop network element is defined as any portion of the loop that is technically feasible to access at terminals in the incumbent LEC's outside plant, including inside wire.

Under the old definition, a subloop could include both the feeder and/or distribution portion of the loop and did not have to terminate at end-user's premises. Thus, the question before us is whether the FCC's language in section 319(b)(1) regarding termination at a customer's premises is intended as a limit on subloops, i.e. the subloop must terminate there, or whether it is an outer limit and that termination at earlier points in the plant are also acceptable, i.e. the subloop could terminate at a pole as requested by SOI.

To answer this question, we look at the policies underlying the FCC's decisions in the TRO proceeding and assess how they have impacted the FCC's word choice in its Rules. First, generally speaking, the FCC determined in the TRO that

ILECs did not have to provide CLECs with access to the fiber portions of the ILEC network. Specifically, the FCC said that it would not require ILECs to unbundle the next-generation network, packetized capabilities of their hybrid loops to allow CLECs to provide broadband services to the mass market. TRO at ¶ 288. The FCC also stated specifically, with respect to subloops, that while it would require ILECs to unbundle the all-copper distribution portion of the loop, it would not require ILECs to unbundle the *fiber* feeder portion of the loop. TRO at ¶ 253. These statements by the FCC appear to be premised upon the typical ILEC network layout: fiber from the central office to a remote terminal, then copper to the customer premises. *See* TRO at ¶ 216.

The FCC acknowledged in paragraph 215 of the TRO that some ILECs deploy copper facilities all the way from the central office to the customer premises, so-called "home-run copper." The FCC requires ILECs to unbundle these facilities as loops and supports their use in providing both narrowband and broadband applications. TRO at ¶¶ 249-250. The FCC states that the CLECs should have access to the complete transmission path between the central office and the demarcation point at the customer's premises. Id. The question we must answer is whether, in giving this full access to the loop, the FCC intended to allow CLECs to use only a portion of the loop – might a CLEC in effect create a copper feeder subloop?

We find that the FCC's policy of supporting CLEC use of the ILEC's legacy copper networks to provide both narrowband and broadband services, as well as the decision to unbundle home-run copper, support CLECs' access to copper subloops as requested by SOI. Further, the impetus for the FCC's decision to limit access to next generation networks was to encourage facility-based investment. Our decision here

today does the same thing—it promotes facility-based investment by the CLECs in Maine. Finally, we find that our decision is also consistent with both federal and state policy to expand broadband capabilities into rural areas.

We stated in the NOI that the new use of copper facilities proposed by SOI may be an effective way to fulfill the objective of bringing broadband services to a wider audience in Maine, in particular in rural areas. None of the parties in this case have disputed this potential. The FCC has also stated that wider access to broadband services is an explicit objective of the TelAct. TRO at ¶ 241-246. If this new subloop allows CLECs to bring broadband service to any new customers, it will have helped fulfill that goal. Therefore, we believe it is in the public interest for Verizon to allow access to its loops as requested by SOI.

Contrary to Verizon's arguments, we do not believe that our conclusion conflicts with any of the FCC's holdings in the TRO and thus issues of preemption do not arise. As Verizon correctly points out in its Post-TRO Brief, the FCC has interpreted Section 251(d)(3) of the TelAct as precluding a state commission from imposing access or interconnection requirements that are inconsistent with the requirements of Section 251 and which substantially prevent implementation of Section 251. Verizon Post-TRO Brief at 6; TRO at ¶192-194. Specifically, the FCC has said that, if it has made a national finding on no impairment for an element and a state requires the unbundling of the element, the state would likely be in conflict with Section 251 (as interpreted by the FCC) and the FCC might seek to preempt the state.

Here, the FCC has made a national finding of non-impairment for fiber feeder but has also made a finding of impairment for home-run copper. Verizon takes

the first finding of non-impairment and broadens its application to all feeder-type facilities; a step that is not warranted by the FCC's language in the TRO nor federal unbundling policy. Verizon argues that a state decision to require copper feeder subloops would conflict with the FCC's decision on fiber feeder subloops. We disagree. We believe that the FCC intended CLECs to have full access to home-run copper loops and that an individual CLEC may decide not to use the entire loop but instead choose to terminate the loop at a point before the customer demarcation point. Our decision today in no way conflicts with the FCC's determination that CLECs should not have access to ILEC fiber facilities nor does it conflict with the FCC's policy of promoting broadband deployment – indeed, it supports broadband deployment.

IV. TECHNICAL FEASIBILTY

Over the course of this proceeding the issue of technical feasibility was discussed at length. Some of the initial disagreement seemed to have been caused by different understandings of the terminology being used, but those hurdles have been overcome. At the conclusion of the hearing and in the parties' briefs, there appeared to be consensus that it is technically feasible for Verizon to provision the requested UNE. Verizon states in its Opening Brief that "provided SOI limits its request for a new subloop element to 'accessible terminals' where Verizon can support access to its loop facilities consistent with the TelAct, Verizon is prepared to move forward in honoring SOI's request". We agree that SOI's requested use of the UNE subloop is technically feasible.

A. Network Interface Devices

One of the technical details that must be considered in this UNE arrangement is the type of NID that will be used on the poles to connect Verizon's network to the CLEC's network. SOI stated that it intends to use an ordinary NID, the type that is used on the side of a customer's residence. Verizon believes that those NIDs will not be sturdy enough to withstand weather conditions and possible vandals or accidents on the poles.

We agree with SOI that ordinary NIDs are durable enough to withstand conditions on the poles, but we believe the parties should work cooperatively to determine the type of NID that best meets the needs of both sides for safety, security and reliability at a reasonable cost. It is clearly in the CLEC's own best interest to ensure good service (to itself in this instance) by using appropriate equipment. Given these circumstances, we direct Verizon and SOI to determine which type of NID is best suited to this type of application.

B. Right-of-Way on Poles

Verizon believes that the CLEC's access to poles is an issue that must be explored and resolved prior to Verizon being able to provision this service. SOI and Cornerstone do not agree with Verizon that this is a necessary separate step. Since it is the CLECs that will need to gain access to the poles to make use of this new subloop and the CLECs do not believe that there is a problem gaining access and permits to do so, we do not agree with Verizon that this is an issue that we need to examine in this Docket. It will be up to the CLECs to secure the appropriate pole attachment licenses from Verizon and/or the electric company.

C. Address Issues

Verizon raised the issue of street address (or lack thereof, in the case of a pole) as a potential impediment to providing this product. Verizon is concerned that its current OSS system may not recognize a pole or cabinet as a "customer location" in the database. However, at the hearing, Verizon witness Lucas described the current process and stated that when the customer's address is input into the ordering system, the system returns the closest pole identification. Tr. 6/18/03 at 110-112. SOI also indicated at the hearing that it has made use of the Verizon "loop makeup report" available to CLECs through Verizon's OSS to obtain serving pole location information and even house drop wire addresses in many cases. Id. at 112. These two facts indicate that the issue of identifying the service location by pole number or other pole identifying information is not one that is insurmountable, even with Verizon's legacy systems.

VI. ADMINISTRATIVE CONCERNS

Verizon has stated that the new offering, if ordered, will "raise a host of administrative concerns for Verizon wholesale operations", largely related to its OSS. Verizon's proposed solution for these issues is to require SOI to make a BFR to Verizon to provide this product and go through the standard BFR process, followed by a field trial. SOI does not believe it should be required to file a BFR in this instance because of the significant time and money already spent litigating this issue.

We agree that SOI should not have to pay the costs associated with a BFR in this case. When the Commission initiated this Investigation on its own motion, it

effectively replaced the need for a BFR. Our investigation and subsequent ordering of Verizon to provide this product will supersede the necessity of SOI filing a BFR. As SOI points out, and we agree, this product will be of interest to other CLECs immediately upon it becoming available from Verizon. We believe this to be true, and we have established previously that we believe the availability of this product is in the public interest. In addition, at the hearing, Verizon witness Rousey stated that "in a standard unbundled network element we recover OSS costs, be it through a different methodology [than a BFR]" Tr. 6/18/03 at 76-77. Therefore, SOI should not have to bear the costs of the BFR, and Verizon should undertake to prepare its OSS to receive orders for this product within 90 days of the date of this Order.

Verizon also suggests that before this product can be provided on a wholesale basis, a field trial is required. SOI did not object to participating in a field trial. While we believe that this product will be of interest to other CLECs in Maine, we do not believe, given the current size and presence of the CLEC market, that a separate field trial is necessary. We believe that the initial number of orders will be sufficiently small so as to in effect be a field trial, while not limiting which CLECs may participate.

VII. CONCLUSION

We order Verizon to provision UNE copper subloops that terminate on a pole or remote terminal box designated by the CLEC, where facilities exist. In order for Verizon to provision the UNE, spare subloops must already be terminated at an accessible terminal and CLECs must provide a street address or pole number for their remote

terminal or NID. Verizon must make all necessary changes to its OSS required to provide this UNE subloop to CLECs within 90 days of this Order.

Respectfully submitted,

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Trina M. Bragdon
Hearing Examiner
on behalf of the Advisory Staff